98

(2)

Supreme Court, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-1334

IN THE

Supreme Court of the United States

IMPROV WEST ASSOCIATES, and
CALIFORNIA COMEDY, INC.,

Petitioners,

v.

COMEDY CLUB, INC. and
AL COPELAND INVESTMENTS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

KELLY O. SCOTT
Counsel of Record
KARINA B. STERMAN
ERVIN, COHEN & JESSUP LLP
9401 Wilshire Boulevard
Ninth Floor
Beverly Hills, CA 90212-2974
Telephone: (310) 273-6333
Facsimile: (310) 859-2325

Attorneys for Respondents

216552

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED[1]

1. Should the Court grant certiorari when the Ninth Circuit partially reversed an arbitrator's decision that was in "manifest disregard of the law", a standard this Court has found to be consistent with the parameters of the Federal Arbitration Act?

2. Should the Court grant certiorari when this Court, the Ninth Circuit and every other circuit in the nation applies the "manifest disregard of law" standard to reviewing arbitral decisions?

3. Should the Court grant certiorari merely because the Ninth Circuit allegedly misapplied an otherwise established and correctly stated rule of law?

---

[1] Petitioners are not seeking re-hearing on the Ninth Circuit's determination that the arbitrator exceeded the scope of his authority in extending the application of the parties' contract to all "affiliates". Accordingly, Respondents do not revisit that issue either.

CORPORATE DISCLOSURE STATEMENT

The Respondents, Comedy Club, Inc. and Al Copeland Investments, Inc. have no parent corporation, and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
SUMMARY	1
REASONS FOR DENYING THE PETITION	3
I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THIS COURT'S RECENT DECISION IN *HALL STREET ASSOCIATES, LLC. v. MATTEL, INC.* ACTUALLY AGREED WITH THE NINTH CIRCUIT'S STATEMENT OF THE LAW, AND THE NINTH CIRCUIT'S DECISION IN THE CASE HEREIN IS CONSISTENT BOTH WITH ITS OWN AND WITH THIS COURT'S STATED RULE OF LAW.	3
II. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION BELOW	

Contents

Page

APPLIED THE WELL ESTABLISHED RULE THAT AN ARBITRATOR'S DECISION MAY BE REVERSED DUE TO THE ARBITRATOR'S MANIFEST DISREGARD OF THE LAW. 7

CONCLUSION 12

TABLE OF APPENDICES

Page

Appendix A — Excerpt Of Brief Of Appellees Of The United States Court Of Appeals For The Ninth Circuit Dated December 19, 2005 ..... 1a

Appendix B — Excerpt Of Petition For Rehearing And Rehearing En Banc Of The United States Court Of Appeals For The Ninth Circuit Filed September 20, 2007 ..... 4a

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Butler Mfg. Co. v. United Steelworkers of Am.,
336 F.3d 629 (7th Cir. 2003) 11

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 5

Hall Street Assoc., LLC v. Matter, Inc.,
552 U.S. ___, No. 06-989, slip op. 1-15
(March 25, 2008) ..... *passim*

Luong v. Circuit City Stores, Inc.,
368 F. 3d 1109 (9th Cir. 2004) 5, 6

Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.,
44 F.3d 826 (9th Cir. 1995) 8

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 5

Porzig v. Dresdner,
497 F. 3d 133 (2nd Cir. 2007) 10

Remmy v. PaineWebber, Inc.,
32 F.3d 143 (4th Cir. 1994) 11

Todd Shipyards Corp. v. Cunard Line, Ltd.,
943 F.2d 1056 (9th Cir. 1991) 6

Wilko v. Swan,
346 U.S. 427 (1953) 5

SUMMARY

Petitioners here seek review of the Ninth Circuit's ruling below finding that an arbitrator who was aware of a material state law but chose to ignore it acted in "manifest disregard of the law." As conceded by Petitioners in their Ninth Circuit briefs, "manifest disregard of the law" is a historically grounded and well-established legal standard for reversing an arbitral decision. As many courts have iterated, it is a notably high standard arising out of and generally defining the specific enumerated grounds set forth in the Federal Arbitration Act (FAA). There are no new issues of law here and the governing legal framework has been clearly set forth in this Court's prior decisions.

The decision below establishes no new principles, but merely applies this Court's well-established rule. Petitioners argue that the Ninth Circuit below misapplied this well-established law and in doing so is squarely at odds with every other circuit in the country. This is simply not accurate – the Ninth Circuit properly applied the law in a manner consistent with this Court's precedent and with other circuits. Moreover, the circuits themselves consistently apply the "manifest disregard of the law" standard and there is no split between the federal courts on the issue.

Finally, Petitioner's invocation of this Court's recent decision in *Hall Street Associates, LLC v. Mattel, Inc.* is a hook without a point. That holding does not apply here because it solely raised (and answered in the negative) the question of whether parties to an arbitration agreement could contractually add grounds

for reversal of an arbitral decision when those grounds are not included in the FAA. This is inapposite here because no such issue arose in this case. The parties here did not attempt to contract around the FAA nor did the Ninth Circuit below address the issue whatsoever. Moreover, although not the main issue in that case, *Hall Street* expressly acknowledged that "the manifest disregard of the law" standard arose out this Court's own precedent and is believed to be a summary articulation of the grounds for reversal set forth in the FAA. In accordance with that precedent, and its own, the Ninth Circuit below applied the well-established standard of "manifest disregard of the law" to the arbitration decision before it and found that the arbitrator indeed manifestly disregarded the law. This finding was amply supported by the record.[2]

Because the there is no mature conflict in the courts of appeals and because the Ninth Circuit's ruling below is consistent with *Hall Street* and other Supreme Court and federal precedent, there is no ground for this Court's review.

---

[2] Presumably, that is why the Ninth Circuit denied Petitioner's Petition for Rehearing and Rehearing *En Banc*.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THIS COURT'S RECENT DECISION IN *HALL STREET ASSOCIATES, LLC. v. MATTEL, INC.* ACTUALLY AGREED WITH THE NINTH CIRCUIT'S STATEMENT OF THE LAW, AND THE NINTH CIRCUIT'S DECISION IN THE CASE HEREIN IS CONSISTENT BOTH WITH ITS OWN AND WITH THIS COURT'S STATED RULE OF LAW.

Contrary to Petitioners' contention, the Ninth Circuit's decision herein does not conflict with this Court's decision in *Hall Street Assoc., LLC v. Matter, Inc.*, 552 U.S. ___, No. 06-989, slip op. 1-15 (March 25, 2008).[3] Rather, the Ninth Circuit is in accord with this Court's decision in *Hall Street*, which is why this Court actually agreed with Ninth Circuit decision that was being reviewed in *Hall Street* and upheld it.

Specifically, the question in *Hall Street* was "whether statutory grounds for prompt vacatur and modification may be supplemented by contract." (*Hall Street*, p.1) In reaching a decision on this issue, this Court addressed the split in authorities across the nation wherein some circuits regard the statutory grounds set forth in the FAA as exclusive grounds for vacatur of an arbitrator's award whereas others believe it is open to expansion by the parties' agreement. (*Hall Street*, p. 6) This Court concluded in *Hall Street* that

---

[3] Page references herein to the *Hall Street* opinion are to the slip op.

the statutory grounds are exclusive and cannot be expanded by contract. (*Hall Street*, p. 1) This Court also found, however, that the Ninth Circuit is one of the circuits that actually complied with this standard. Specifically, this Court repeatedly and expressly "agreed" with the Ninth Circuit on the subject and concluded that the Ninth Circuit was applying the correct standard of review under the FAA. (*Hall Street*, pp. 4, 6 fn. 5, and 15.)

It should be noted that Petitioners never asserted in either their Appellee Brief nor in their Petition for Rehearing, below, that the Ninth Circuit failed to apply the appropriate ground for vacatur of arbitration awards under the FAA. Petitioners also never claimed that the "manifest disregard of the law standard" invoked by Respondents and applied by the Ninth Circuit was outside the permissible parameters of the FAA. Indeed, Petitioners never discussed Sections 10 and 11 of the FAA whatsoever. Rather, in response to the Ninth Circuit's ruling herein, Petitioners devoted pages of their Petition for Rehearing to discussing how "manifest disregard of the law" is essentially the law of the land throughout the circuits. [Resp. App. 7a-13a] It is disingenuous for Petitioners to now assert the opposite.

Moreover, contrary to Petitioners' arguments, *Hall Street* did not create a new rule for the Ninth Circuit, but rather affirmed the rule that the Ninth Circuit had been applying. Specifically, when the Ninth Circuit in this case vacated a portion of an arbitrator's decision because it was in "manifest disregard of the law", it was operating within the parameters set forth in *Hall Street*

and earlier Supreme Court decisions. Neither *Hall Street*, nor any other Supreme Court decision, states that the long established "manifest disregard of the law" standard is outside the scope of the FAA or that it is no longer valid.[4]

Indeed, as it has been established and historically reaffirmed by this Court, "manifest disregard of the law" has been an accepted standard for vacatur of an arbitrator's ruling under the FAA. (*Hall Street*, p. 8) (See, *Wilko v. Swan*, 346 U.S. 427 (1953)). The *Wilko* language was then accepted and cited by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (stating that an arbitration award could be overturned if it was procured by corruption, fraud, or undue means, if the arbitrator exceeded his powers, and if the arbitrator's decision was "manifest disregard" of the law) (cite omitted).

This standard has been interpreted as a collective referral to the enumerated grounds set forth in Section 10 of the FAA. (*Hall Street*, p. 9) (See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting)). Indeed, even the court in *Luong* acknowledge that "manifest disregard of the law" is not in the words of the FAA

---

[4] Petitioners' citation to *Luong v. Circuit City Stores, Inc.*, 368 F. 3d 1109 (9th Cir. 2004), to the contrary is a decontextualized and incomplete reference that is no more than a red herring here. [Petition, p. 8] The Ninth Circuit there did ***not*** say that the "manifest disregard of the law" standard fell outside the parameters of the FAA and specifically cited precedent as suggesting that **the "manifest disregard of the law" standard "really defines" Section 10 of the FAA**. (See discussion herein)

statute but still arises from it. See, *Luong*, 368 F. 3d at 1112 (citing *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1059-60 (9th Cir. 1991) for the proposition that the "manifest disregard for law" standard "really defines" Section 10 of the FAA). This interpretation is consistent with the statutory construction of the FAA. In *Hall Street*, this Court expressly allowed for the assumption that Sections 10 and 11 of the FAA "could be supplemented to some extent". (*Hall Street*, p. 9) It follows logically that both the phrase "any other misbehavior [of the arbitrator] by which the rights of any party have been prejudiced" under § 10(a)(3) and "the arbitrators so imperfectly executed [their powers]" under § 10(a)(4) are broad enough to encompass a situation where arbitrators refuse to follow settled law and are therefore in manifest disregard of it. That is precisely what occurred in the case below and that is the reason that the Ninth Circuit vacated the offending portion of the arbitration award.

In sum, at no time did this Court in *Hall Street* conclude that the "manifest disregard of the law" ground for reversal of an arbitrator's ruling falls outside the enumerated penumbra in the FAA. The Ninth Circuit's decision herein that the arbitration award should be reversed because of the arbitrator's manifest disregard of the law does not conflict with this Court's recent decision in *Hall Street*.

There is no ground for Supreme Court review.

II. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION BELOW APPLIED THE WELL ESTABLISHED RULE THAT AN ARBITRATOR'S DECISION MAY BE REVERSED DUE TO THE ARBITRATOR'S MANIFEST DISREGARD OF THE LAW.

Petitioners' other asserted basis for granting certiorari review here is that the decision of the Ninth Circuit below allegedly conflicts with decisions of this Court and every other circuit applying the FAA by reversing an arbitrator's ruling for "mere errors of law." [Petition p. 9] This completely misrepresents the Ninth Circuit's decisions below both legally and factually.

The Petition is fundamentally incorrect. The Ninth Circuit below did *not* reverse the arbitrator's ruling because it was "in good faith" but "erroneous." [Petition p. 9] The Ninth Circuit also did *not* reverse the arbitrator's ruling because it just believed that he was "wrong". [Petition p. 14] The Ninth Circuit below reversed the arbitrator's ruling because it was in "manifest disregard of the law." [App. 27a] This is a historically established basis for reversing an arbitral ruling and it is consistent with the grounds set forth in the FAA. Petitioners have repeatedly conceded this.

Petitioners conceded in their Appellee Brief in the court below that "An arbitration award will be set aside only if it was made in 'manifest disregard of the law." (cite omitted) [Resp. App. 3a] Similarly, in their Petition for Rehearing and Rehearing En Banc, Petitioners again conceded that "manifest disregard of the law" is a valid

basis for overturning an arbitrator's decision. [Resp. App. 7a-13a] Even in the Petition herein, Petitioners cite countless opinions of practically every circuit court in the nation in support of this. [Petition pp. 12-14]

The real basis for Petitioner's seeking a writ of certiorari here is that they are unhappy with the resulting conclusion the Ninth Circuit reached when it applied the "manifest disregard of the law" standard, asserting that the Ninth Circuit "dramatically alters this 'manifest disregard' standard for review of an arbitration award." [Petition p. 7]. Merely disagreeing with the Ninth Circuit's ultimate ruling while acknowledging that it applied a properly stated rule of law does not constitute a compelling reason for justifying Supreme Court review of that ruling.

More importantly, the Ninth Circuit did not alter or misapply the "manifest disregard of law" standard below. Specifically, the Court's opinion below quotes verbatim the Ninth Circuit precedent for applying a "manifest disregard of the law" analysis to an arbitration award, stating that "[i]t must be clear from the record that the arbitrator [] recognized the applicable law and then ignored it." [App. 21a, citing *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (bracketed text omissions in original)]. The Court below then proceeded to apply that standard accurately:

> Keeping in mind these settled principles of California law . . . we proceed to evaluate whether the arbitrator's decision was in manifest disregard of the law. [App. 25a]

* * *

> The arbitrator's award, while aware of *Dayton Time Lock*, interpreted it in a way to render it inapplicable to this case. [App. 26a]

* * *

> The arbitrator's ruling . . . ignores [California Business and Professions Code] CBPC § 16600 and thus is in manifest disregard of the law. [App. 27a]

Contrary to Petitioners' assertion that the Panel found that the arbitrator engaged in good faith but erroneous application of state law [Petition p. 9], the Ninth Circuit expressly found that the arbitrator's ruling "**ignores**" state law and, despite being aware of it, rendered it inapplicable and therefore ignored it in this case. [App. 26a and 27a] Hence, the Ninth Circuit applied the correct standard and applied it cogently and properly. Contrary to Petitioners' accusation, **the Ninth Circuit correctly applied the standard and acted consistently and in accordance with established Ninth Circuit precedent.**

Furthermore, the Petition is also incorrect in its baseless assertion that the Ninth Circuit's opinion conflicts with "every other circuit". [Petition p. 9] A review of the various circuits interpreting the issue, even if limited to the cases selected for citation in their Petition, demonstrates that the circuits themselves employ judicial flexibility in applying the "manifest disregard of the law" standard. But they all apply it.

In fact, far from Petitioner's contention, the circuits do not say that so long as an arbitrator evidenced a "good faith effort" to apply the law then his decision is not reversible. On the contrary, the cases Petitioners cite from the First, Third, Sixth, Tenth and Eleventh Circuits all echo the Ninth Circuit's explication of the "manifest disregard of the law" standard.

Indeed, most recently, the Second Circuit weighed in on the analysis with *Porzig v. Dresdner*, 497 F.3d 133 (2nd Cir. 2007), a decision Petitioners fail to cite to the Court. The Second Circuit Court there first articulated that the standard for reversal requires both that the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and that the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case. Based thereon, the Second Circuit overturned an arbitration panel's award of attorney's fees in favor of the Appellant based on a finding that the arbitrators demonstrated "manifest disregard of the law" because they inexplicably applied a contingency-fee agreement analysis to their calculation of the amount of attorney's fees rather than the loadstar method required by Second Circuit precedent. This analysis and conclusion is completely in line with the Ninth Circuit's decision herein.[5] It is, in fact, consistent with the majority of the circuits in the nation.

---

[5] The Second Circuit's decision and application of the "manifest disregard of the law" standard particularly noteworthy not only because of its timeliness but also because New York statute is the basis for the FAA itself. *Hall Street*, p.12 fn.7.

The Fourth Circuit (stating that a party must prove that an arbitrator found a law applicable to the case but chose to ignore it[6]) and the Seventh Circuit (stating that the "manifest disregard" standard is only met when the arbitrator orders the parties to violate the law[7]) are themselves distinct from the majority of the circuits in that they interpret the "manifest disregard of the law" standard more acutely than the rest. **However, this is far from a split in the circuits or a failure of a circuit court to follow this Court's precedent.**

Petitioners try desperately to convince this Court that the Ninth Circuit's decision below is inconsistent with statutory, Supreme Court or existing Ninth Circuit authority. It is not. It is consistent both in its invocation of what is the applicable authority as well as in its analytical application of that authority within the context of this case. Accordingly, the Petition for writ of certiorari should be denied.

---

[6] *Remmy v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).

[7] *Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629 (7th Cir. 2003).

CONCLUSION

Petitioners are simply, and predictably, attempting to get "another bite at the apple", and unfortunately using any means necessary (including misstating both the law and the Ninth Circuit's ruling). However, the Ninth Circuit here neither strayed from its own precedent nor from this Court's precedent. Rather, the Ninth Circuit reasonably and properly applied a well-established standard to reverse a portion of an arbitrator's ruling.

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KELLY O. SCOTT
Counsel of Record
KARINA B. STERMAN
ERVIN, COHEN & JESSUP LLP
9401 Wilshire Boulevard
Ninth Floor
Beverly Hills, CA 90212-2974
Telephone: (310) 273-6333
Facsimile: (310) 859-2325

Attorneys for Respondents

APPENDIX

APPENDIX A — EXCERPT OF BRIEF OF APPELLEES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED DECEMBER 19, 2005

Appendix A

Docket Nos. 05-55739(L), 05-56100

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMEDY CLUB, INC. and AL COPELAND INVESTMENTS, INC.,

Appellants,

vs.

IMPROV WEST ASSOCIATES and CALIFORNIA COMEDY, INC.,

Appellees.

Appeal from the United States District Court for the Central District of California,
District Court No. CV 03-8134 WMB
Hon. Wm. Matthew Byrne, Jr.

BRIEF OF APPELLEES

IRELL & MANELLA LLP
Richard B. Kendall (90072)
Robert N. Klieger (192962)
Katharine J. Galston (237442)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Attorneys for Appellees

Appendix A

* * *

V. STANDARD OF REVIEW

A district court's confirmation of an arbitration award is reviewed *de novo*. *See Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996). Absent a showing to the contrary, the arbitrator is presumed to have relied on permissible grounds in making his or her decision and to have made an appropriate award. *See A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992). An arbitration award will be set aside only if it was made in "manifest disregard of the law." *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995). This stringent standard of review requires confirmation of an arbitration award "even in the face of 'erroneous . . . misinterpretations of law.'" *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991). To vacate an arbitration award on the ground of manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law but chose to ignore it. *See Michigan Mut. Ins. Co.*, 44 F.3d at 832.

* * * *

APPENDIX B — EXCERPT OF PETITION FOR REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 20, 2007

Appendix B

Docket Nos. 05-55739(L), 05-56100
Opinion Filed September 7, 2007
Before: Jerome Farris and
Ronald M. Gould, Circuit Judges,
and Kevin Thomas Duffy, District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMEDY CLUB, INC. and AL COPELAND INVESTMENTS, INC.,

Appellants,

vs.

IMPROV WEST ASSOCIATES and CALIFORNIA COMEDY, INC.,

Appellees.

Appeal from the United States District Court for the Central District of California,
District Court No. CV 03-8134 WMB
Hon. Wm. Matthew Byrne, Jr.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Appendix B

IRELL & MANELLA LLP
Richard B. Kendall (90072)
Robert N. Klieger (192962)
Katharine J. Galston (237442)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Attorneys for Appellees

* * *

Appendix B

ARGUMENT

A. The Panel's Decision Creates Serious Conflicts Of Authority Regarding The Standard For Review Of An Arbitration Decision

The Panel's ruling that the arbitrator's reasoned analysis of CBPC § 16600 constituted "manifest disregard of the law" conflicts with clear Ninth Circuit authority. As this Court (Kozinski, Fernandez, Rymer) recognized in *Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109 (9th Cir. 2004), "manifest disregard of the law" has a well-defined meaning that does not reach errors of law, or even clear errors of law, by the arbitrator. *Luong* concerned an appellant's argument that the arbitrator had manifestly disregarded a controlling case, *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002), in rendering his award. This Court easily rejected the appellant's argument:

> . . . "[M]anifest disregard of the law" has a well-defined meaning that Luong's petition cannot possibly meet. "Manifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." *Mich. Mut. Ins. Co. v. Unigard Sec. Ins.* Co., 44 F.3d 826, 832 (9th Cir. 1995) (internal quotation marks omitted). "It must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Id.*

Appendix B

> Luong's complaint is that the arbitrator extended the ruling of *Toyota*, and thus disregarded it. However, without expressing a view one way or the other on whether the arbitrator got *Toyota* right, it is clear that the arbitrator did not *ignore* it. His written decision is part of the petition. Virtually every line of the opinion and award discussed *Toyota* and how it plays out on the facts in Luong's case. That cannot amount to "manifest disregard of federal law."

Luong, 368 F.3d at 1112.

The Panel's decision dramatically alters this "manifest disregard" standard for review of an arbitration award. The circumstances of this case are identical to those in *Luong*. CCI complains that the arbitrator misapplied CBPC § 16600 and thus disregarded it. However, it is clear that the arbitrator did not *ignore* CBPC § 16600. His written orders devote pages to a discussion of CBPC § 16600 and how it applies to the facts of this case. Under *Luong*, that simply cannot amount to "manifest disregard of the law."

The arbitrator similarly cannot be said to have disregarded *Dayton Time Lock Serv., Inc. v. Silent Watchman Corp.*, 52 Cal. App. 3d 1 (1975), a case that CCI did not even cite in the appeal but that became the lynchpin of the Panel's decision. The arbitrator did not ignore *Dayton Time Lock*, nor did he recognize that *Dayton Time Lock* controls the present dispute yet

refuse to apply it. Instead, the arbitrator considered the case and offered a reasoned explanation of why it is inapposite. SER 179. The Panel disagreed with the arbitrator's reading of *Dayton Time Lock* and found that "[t]he grounds given by the arbitrator for disregarding *Dayton Time Lock* are fundamentally incorrect." Opinion at 11849. However, the Panel's belief that the arbitrator was wrong, or even clearly wrong, is simply not relevant. The arbitrator's good faith determination that *Dayton Time Lock* is not applicable to the facts of this dispute, even if mistaken, cannot constitute "manifest disregard." At most, it reflects a misreading or misunderstanding of the case—*i.e.*, an error of law—that is not a valid basis for overturning the arbitrator's decision.[1]

The Panel's decision conflicts with the well-defined meaning of "manifest disregard" not only in the Ninth Circuit, but also under the controlling cases in *every other circuit.* In every circuit, the focus is not on

---

1. *See A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) ("The courts should not reverse even in the face of erroneous interpretations of the law."); *American Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982) ("An arbitrator's award will not be vacated because of erroneous findings of fact or misinterpretations of law."); *see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1003 (9th Cir. 2003) (en banc) ("[t]he risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law . . . is a risk that every party to arbitration assumes").

whether the arbitrator got the law right or wrong, but instead on whether he or she made a good faith effort to correctly apply the law. In *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672 (8th Cir. 2004), the Eighth Circuit clearly distinguished between a good faith error of law, which is not a basis for overturning an arbitration award, and deliberate defiance of the law, which is: "Manifest disregard requires something more than a mere error of law. If an arbitrator, for example, stated the law, acknowledged that he was rendering a decision contrary to law, and said that he was doing so because he thought the law unfair, that would be an instance of 'manifest disregard.' . . . To require anything less would threaten to subvert the arbitral process." *Id.* at 674. Every other circuit has similarly determined that an arbitrator's good faith effort to correctly apply the law precludes a finding of "manifest disregard."[2]

---

2. *E.g., First Circuit: Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) ("'[D]isregard' implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it."); *Second Circuit: Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) ("A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." ; *Third Circuit: Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 533 (3d Cir. 1985) ("An award may be set aside only in limited circumstances, for example, where the arbitrator's decision evidences manifest disregard for the law rather than an erroneous interpretation of the law."); *Fourth Circuit: Remmy v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994) ("[A] court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant

(Cont'd)

Appendix B

(Cont'd)

is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision."); *Fifth Circuit: Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) ("Manifest disregard means more than error or misunderstanding with respect to the law.") (internal quotation marks omitted); *Sixth Circuit: Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) ("This court has emphasized that manifest disregard of the law is a very narrow standard of review. A mere error in interpretation or application of the law is insufficient.") (internal citation omitted ; *Seventh Circuit: Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 636 (7th Cir. 2003) ("[A]n arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law. That the arbitrator in this case may have misunderstood the [governing statute] is simply not relevant.") (internal citation omitted); *Eighth Circuit: Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir. 1986) (manifest disregard "may be found when arbitrators understand and correctly state the law, but proceed to disregard the same."); *Tenth Circuit: Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) ("Requiring more than error or misunderstanding of the law, a finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.") (internal citation omitted); *Eleventh Circuit: Aldred v. Avis Rent-A-Car*, 2007 WL 2110720, at *2 (11th Cir. July 24, 2007) ("An arbitrator manifestly disregards the law if he was conscious of the law and deliberately ignored it; merely misinterpreting, misstating, or misapplying the law does not suffice."); *District of Columbia Circuit: Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1182 (D.C. Cir. 1991) ("'Manifest disregard" may be found for example, if the panel understood and correctly stated the law but then proceeded to ignore it.").

Appendix B

Far from deliberately defying CBPC § 16600, the arbitrator's orders reflect a good faith effort to correctly apply the statute in the context of an in-term covenant against competition. Indeed, as the District Court acknowledged, the arbitrator's application of CBPC § 16600 is perfectly *consistent* with the decisions cited by the arbitrator affirming the validity of in-term covenants under CBPC § 16600, including decisions of the California Court of Appeal (*Fowler*), the Eastern District of North Carolina (*Keating*), the Northern District of Illinois (*Great Frame Up*), and even this Court (*Shaklee*).[3] That cannot be "manifest disregard of the law."

In sum, the Panel's finding that the arbitrator's good faith but, in the Panel's view, erroneous application of CBPC § 16600 constituted "manifest disregard of the law" flies in the face of the uniform precedent of this

---

3. Although *Shaklee U.S. Inc. v. Giddens*, 934 F.2d 324 (9th Cir. 1991), is an unpublished decision, and therefore is not binding precedent, the decision has been cited as persuasive authority by the Northern District of Illinois, the Eastern District of North Carolina, and the District of Utah and was considered by the arbitrator in this case. *Great Frame Up Sys., Inc. v. Jazayeri Enters., Inc.*, 789 F. Supp. 253, 255-56 (N.D. Ill. 1992); *Keating v. Baskin-Robbins USA Co.*, 2001 WL 407107, at *13 (E.D. N.C. Mar. 27, 2001); *SCO Group, Inc. v. Novell, Inc.*, 2007 WL 2327587, at *43 (D. Utah Aug. 10, 2007). The fact that a three-judge panel of this Court determined that *in-term* covenants against competition do not violate CBPC § 16600, even if not precedent, must preclude a finding that the same ruling by the arbitrator constitutes "manifest disregard of the law."

and every other circuit. The Panel's decision invites broad judicial review of arbitral decisions and, if permitted to stand, "could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera*, 341 F.3d at 998.

* * * *